



**In the Supreme Court of the
United States**

No. 78-430

EDGAR TODD, JR., and ALICE TODD,
Plaintiffs-Petitioners
vs.

**ASSOCIATED CREDIT BUREAU SERVICES,
INC., GENERAL CREDIT CONTROL, INC.,
and HESS'S, INC.,**
Defendants-Respondents

**BRIEF OF RESPONDENT, HESS'S, INC.,
OPPOSING PETITION FOR WRIT OF
CERTIORARI**

JOSEPH F. LEESON
*Attorney for Respondent,
Hess's, Inc.*

429 East Broad Street
Bethlehem, Pennsylvania 18018
(215) 691-3320

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Counter-Statement of the Facts

COUNTER-STATEMENT OF THE FACTS

Hess's, Inc., (hereinafter referred to as "Hess's") would urge that your Honorable Court, in reviewing the record, take notice of the fact that prior to the filing of their appeal brief with the Third Circuit Court of Appeals, Petitioners never alleged that General Credit Control, Inc., was the agent, workman or servant of Hess's, Inc. The complaint makes no such allegation and the subsequent record is devoid of any evidence which would substantiate Petitioners' agency claim.

In several instances, Petitioners' statement of the facts of the case claims that "credit information" was given by Hess's to Associated Credit Bureau Services, Inc. The statement of facts goes on to allege that Hess's never "updated" its "credit reports". Such references to "credit information" and "credit reports" are inappropriate as they represent a conclusion of law and not a fact. In that regard, the record reads as follows:

Q. Turning to what is for our purposes Page 3 of Exhibit 2 which is captioned service to be provided by Allentown Credit Bureau for Hess's, Mrs. Rohrbach, would you explain please Paragraph 5 of that page captioned credit bureau access to Hess's files, as to what that means to you—to Hess's?

A. Do you want me to just explain it and not read it?

Q. Yes.

A. To us—to me this means that we would give the credit bureau a list of names, addresses, balances

Counter-Statement of the Facts

at which time they would—they would know that they were not credit worthy at that time with Hess's. Now, the last sentence says follow-up information as to when payment in full of the past due balance has been received by Hess's will be forwarded to the bureau, and the big saving, whenever possible.

Q. And, the information that you would forward under Paragraph 5 of this agreement, what would be the source of that information?

A. It would be a delinquent account from our records.

Q. From your records?

A. Since delinquent accounts are for letter service.

Q. What would that account record be based upon?

A. Our file.

Q. Your file. Would that constitute transactions at your store?

A. Yes.

Q. Would it constitute information other than transactions at your store?

A. No.

(Deposition of Ruth M. Rohrbach Dated July 8, 1976, Pages 41 and 42.)

It is clear, from all the facts of record, that the only information given by Hess's to Associated Credit Bureau Services, Inc., was information relating solely to Hess's own transactions with its own charge customers.

*Counter-Statement of Question Presented***COUNTER-STATEMENT OF THE QUESTION
PRESENTED**

Is Respondent, Hess's, Inc., a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act, 15 U.S.C. Section 1680, et seq.?

ARGUMENT

Respondent, Hess's, Inc., Is Not a "Consumer Reporting Agency" Within the Meaning of the Fair Credit Reporting Act, 15 U.S.C. Section 1680, et seq.

With respect to Respondent, Hess's, Inc., the sole question at issue in this case is whether or not Hess's, Inc., is a consumer reporting agency within the meaning of the Federal Fair Credit Reporting Act. If it is not, then the issues of accuracy, stale material, misleading information, and periodic updating, relating only to "consumer reports" and "consumer reporting agencies", as defined in the Act, are clearly inapplicable to Respondent, Hess's, Inc.

Hess's is a retail department store. Hess's merely provided the other Respondents in this case with its *own* ledger experiences. Hess's relayed only its *own* credit experience on the Petitioners to Associated Credit Bureau Services, Inc., and/or General Credit Control, Inc. All data supplied by Hess's contained information solely as to transactions and/or experiences between the Petitioners and Hess's. Any and all information assembled by Hess's was for the sole purpose of recording and controlling charge account privileges extended to its own customers. These facts are disputed. Given these facts, Hess's, Inc., is not a consumer reporting agency and the information obtained by the other Respondents from Hess's was not a consumer report.

The purpose of the Federal Fair Credit Reporting Act is:

... To require that *consumer reporting agencies* adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C.A., Section 1681 (b), 84 Stat. 1128, Oct. 26, 1970 (emphasis added).

The Federal Fair Credit Reporting Act defines "consumer reporting agency" as:

... Any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing *consumer reports* to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing *consumer reports*.

15 U.S.C.A., Section 1681 (a) (f), 84 Stat. 1128, Oct. 26, 1970 (emphasis added).

The Federal Trade Commission has been given the responsibility of enforcing compliance with the requirements imposed under the Act. 15 U.S.C.A., Section 1681 (a), 84 Stat. 1134, Oct. 26, 1976. Pursuant to this authority, the Federal Trade Commission has issued guidelines for the interpretation of the Act to which the Courts

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may refer in determining issues which arise under the Act. *Fernandez v. Retail Credit Co.*, 349 F. Supp. 652 (E.D. La., 1972).

With respect to the interpretation of the term "consumer credit agency", the *Federal Trade Commission Compliance Pamphlet* states as follows:

As indicated earlier, giving out a firm's own ledger experience does not make it a Consumer reporting agency or the information a consumer report. In order to be a consumer reporting agency, the firm must engage "in whole or in part" in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When a firm gives *its own credit experience on a consumer to a credit bureau*, that information does not constitute a consumer report: . . .

4 CCH *Consumer Credit Guide*, Paragraph 11305 (emphasis added).

In the case of *Porter v. Talbot Perkins Children's Services, et al.*, 355 F. Supp. 174 (S.D. N.Y., 1973), a case in which prospective adoptive parents were rejected and subsequently sued the adoption agency under the Federal Fair Credit Reporting Act, the Court held that the defendant was not a credit reporting agency because its purpose in gathering information was not for distribution to third parties. The Court further stated, with respect to the statutory definition of "consumer credit agencies", the following:

Essentially, this definition contains four links.

(1) The consumer reporting agency must act for

Argument

monetary fees, dues, or on a cooperative non-profit basis; (2) it must regularly engage in whole or in part in gathering or evaluating information on consumers; (3) the purpose of such activity must be the distribution of information to third parties engaged in commerce; and (4) the agency must use a facility of interstate commerce to prepare or distribute the reports.

Id. at pp. 176-177.

Respondent, Hess's, Inc., is a retail department store. Hess's is a customer of the Associated Credit Bureau Services, Inc., a corporation which is a consumer reporting agency within the Act. Hess's, Inc., has no proprietary interest in, owns no stock of, and has no control over Associated Credit Bureau Services, Inc. Hess's also maintains its own charge account privileges for its own customers and keeps records and ledgers with respect to said customers and the balances due and owing from said customers to Hess's, Inc.

In the event that Respondent, Hess's, Inc., is unsuccessful in its internal attempts to collect its own past due charge account balances, the delinquent accounts are forwarded to Associated Credit Bureau Services, Inc., and General Credit Control, Inc., for outside collection. Attendant to this procedure is the forwarding of ledger information containing Hess's own experience with its particular customer stating the total outstanding balance due Hess's. In addition, in limited situations, Hess's will, upon verified requests from Associated Credit Bureau Services, Inc., provide that Bureau with information relating solely to Hess's charge account credit transactions with its own, individual customers.

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Hess's, Inc., does not supply this individualized information to the Bureau for monetary fees, dues, or on any cooperative non-profit basis. Hess's does not engage in whole or in part in gathering or evaluating information on customers. The only information available to Hess's is that which is shown on its own credit card ledger records. Any information which is in the hands of Hess's is not for the purpose of distribution to third parties engaged in commerce, but solely for the purpose of keeping accurate accounts of amounts due Hess's by its own charge customers. Hess's distributes no credit reports through any means of interstate commerce nor does it prepare any credit reports by virtue of said means.

The Court, in *Porter v. Talbot Perkins Children's Services, et al., supra*, went on to indicate that the focus of Congress in creating the Fair Credit Reporting Act was the consumer credit industry and of particular concern was the effect of the information compiled and forwarded by an entity not dealing directly with an individual. *See also*; 17 ALR Fed. 702 (1973). In the instant case, it is clear that Hess's, Inc. and other retail stores extending credit privileges to their own customers are not the entities toward which the Act is directed. The Act is directed at third party reports prepared and distributed by individuals or companies who have never dealt directly with the individual consumer. The undisputed facts in this case clearly indicate that Hess's, Inc., is not a consumer reporting agency as defined in the Act, nor as intended by Congress, the Federal Trade Commission, or the lower Federal Courts which have dealt with the Federal Fair Credit Reporting Act.

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Respondent, Hess's, Inc., respectfully takes serious issue with Petitioners' interpretation of the cases upon which their brief relies. As more fully set forth hereinafter, those decisions simply do not substantiate Petitioners' theory with respect to Hess's. On the contrary, those cases support the position set forth by Hess's, Inc.

Beresh v. Retail Credit Company, Inc., et al., 358 F. Supp. 260 (C.D. Cal., 1973), contrary to the Petitioners' brief, gives no implication that a life insurance company becomes a credit reporting agency when it acts in concert with a credit bureau. In that case, the plaintiff sued the defendants based upon information gathered by a credit reporting agency and relayed to the insurance company. The information was requested by the insurance company in an effort to determine whether it should continue disability payments to the plaintiff.

The question before the Court was whether the investigative reports prepared by the defendant, Retail Credit Company, were "consumer reports" within the meaning of the Act. The case never addressed nor discussed the status of the insurance company under the Act, nor did it make any reference thereto.

Contrary to Petitioners' brief, *Hansen v. Morgan, et al.*, 405 F. Supp. 1318 (D. Idaho, 1976), did not state that merchants who are members of a credit reporting bureau become credit reporting agencies within the Act. That case involved a defendant who received information from a credit reporting agency and attempted to use it in a political campaign. The defendant was a member of that credit bureau and requested information which he later used to allegedly defame the plaintiff.

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The Court stated that Section 1681(b) of the Act relates only to consumer reporting agencies, and not users, as the defendant was in that case. The opinion of the Court is completely devoid of any language which even infers that a merchant who participates in a credit bureau becomes a credit reporting agency itself. In fact, the case states the exact contrary; i.e., the participating merchant is a "user" and not a "credit reporting agency".

Greenway v. Information Dynamics, Inc., 399 F. Supp. 1092 (D. Ariz., 1974), also cited in Petitioners' brief involved a situation wherein the defendants provided subscribing merchants with check cashing information. This information was obtained from the member merchants based upon their own transactions with their consumers.

In that case, the plaintiff's claim, that the compiling agency disseminated more information than was necessary; i.e., random lists instead of answers to specific requests on particular transactions or consumers, was upheld by the District Court. However, the Court, in the first footnote to its opinion, specifically stated that an exception to the Act is information given solely as a result of transactions between the reporter and the consumer. The opinion never implied that the merchants who gave their own experiences and received the random lists from the reporting agency were themselves, credit reporting agencies.

Petitioners' claim, that Hess's, Inc., became a credit reporting agency by virtue of its association with Associated Credit Bureau Service, Inc., is simply not supported by the cases cited in their brief. In fact, those cases clear-

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ly and correctly state, in accordance with the *Federal Trade Compliance Pamphlet*, supra, that such merchants are not credit reporting agencies as they provide only information based on their own transactions with their own customers.

The Federal Fair Credit Reporting Act defines "consumer report" as

. . . any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility . . . *the term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; . . .*

15 U.S.C.A., Section 1681a(d), 84 Stat. 1128, Oct. 26, 1970 (emphasis added).

The language set forth above is taken directly from the United States statute. It is clear that any information provided by Hess's, Inc., to the other Respondents in this case was not a consumer report, as defined by the Act. The Act clearly states that a consumer report is a communication of information by a consumer reporting agency. It has been clearly established above that Hess's, Inc., is not a consumer reporting agency. In addition, the *Federal Trade Commission Compliance Pamphlet*, supra, states precisely that ". . . when a firm gives its own credit experience on a consumer to a credit bureau, that infor-

mation does not constitute a consumer report . . ." 4 CCH *Consumer Credit Guide*, Section 11305, *supra* (emphasis added).

With respect to the provisions of 15 U.S.C.A., Section 1681a(d), which exclude reports containing information solely as to transactions or experiences between the consumer and the person making the report; the *Federal Trade Commission Compliance Pamphlet* goes on to state that the exclusion in the definition of "consumer report", which encompasses those trade reference information exceptions designed to cover experience furnished by a creditor to other creditors of the consumer, is limited to "transactions and experiences" between the person contacted for information and the consumer, of which that person has firsthand knowledge.

In the case of *Peller v. Retail Credit Company*, 359 F. Supp. 1235 (N.D. Ga., 1973), *aff'd.*, 505 F.2d 733 (5th Cir., 1974), the Court was faced with a situation wherein the plaintiff was suing the defendant based upon information provided by the defendant to a prospective employer of the plaintiff. The defendant was in the business of giving polygraph examinations to prospective employees and then communicating the results to the employer. The District Court held that information given to a prospective employer by a polygraph operator is not a consumer report because that information contains only information solely as to transactions or experiences between the prospective employee and the person making the report; i.e., the polygraph company. The Court went on to state that the defendant was not a consumer reporting agency because it did not engage in assembling information for the purpose of furnishing consumer reports.

The case of *U.S. v. Puntorieri*, 379 F. Supp. 332 (E.D. N.Y., 1974), involved a situation wherein the plaintiff was suing the defendant bank under the Federal Fair Credit Reporting Act as a result of information given to the government at the request of the Internal Revenue Service. The Court, in granting the defendant's motion for a summary judgment, held that the information given by the defendant was a report containing information solely as to transactions between the consumer and the person making the report, and, as such, was not subject to the provisions of the Act.

In reviewing, analyzing, and summarizing the current state of the Federal Fair Credit Reporting Act, the editors of 17 *ALR Fed.*, at page 702, state, "It should be noted that the term 'consumer report' does not include any report composed entirely of information as to transactions and experiences between the consumer and the person making the report."

The information allegedly supplied by Hess's, Inc., to Respondent, Associated Credit Bureau Services, Inc., and/or Respondent, General Credit Control, Inc., is information relating solely to the experiences and transactions that Hess's, Inc., the entity making the report, had with the Petitioners and is based wholly on firsthand information. There is no intent that this information be a compilation of investigation or otherwise on behalf of Hess's, Inc.

Hess's, Inc., is not a consumer reporting agency and does not supply consumer reports. As such, the provisions of the Federal Fair Credit Reporting Act are not applicable to Hess's, Inc., and, consequently, the allega-

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tions contained in Petitioners' complaint against Hess's, Inc., are without merit.

CONCLUSION

For the foregoing reasons, Respondent, Hess's, Inc., is entitled to denial of the petition for writ of certiorari and thereby an affirmation of the District Court's grant of summary judgment in its favor.

Respectfully submitted,

JOSEPH F. LEESON,

*Attorney for Respondent, Hess's,
Inc.*